

IN THE CASE OF: ██████████

BOARD DATE: 21 February 2024

DOCKET NUMBER: AR20230008741

APPLICANT REQUESTS:

- an upgrade of his bad conduct discharge
- a personal appearance before the Board

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record), 4 April 2023
- Self-authored Statement
- 17 Character Letters

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states:

a. After completing basic training and advanced individual training he was assigned to Camp Hovey, Korea; and in 1997 he was reassigned to Fort Hood, TX. He obtained the rank of sergeant and he also got married. His ex-wife's friend worked in finance and informed him that he can get extra benefits by applying for basic allowance for housing (BAH). He believed that the process was legit. He was reassigned to Korea, and during in processing he applied for BAH benefits; not knowing he engaged in a wrongful act.

b. He was selected by his chain of command to train Soldiers and the noncommissioned officers. He attended the staff sergeant promotion board and was assigned as a section chief. His career was going great, until he heard about the BAH fraud. He started to get angry and uneasy. He called back home and asked his ex-wife what they got him into. He was going to let them know what happened and inquire on rectifying the situation and clearing his name. The next day he was called into the criminal investigation division (CID) office and questioned about his actions. He was

furious and felt betrayed. Prior to this incident he was never reprimanded or had any adverse actions. He embarrassed the U.S. Army, his chain of command, peers, and his family. He took full responsibility for his actions. He was later confined and paid his restitution in full.

c. It has been 17 years since he decided to commit BAH fraud. He has kept in touch with many of his peers, superiors, and colleagues. A vast majority of them are retired; and he was also on the same career path.

3. The applicant provided 17 character letters from former Soldiers and his spouse that speak to his moral character being impressive as well as his strong dedication to the U.S. Army, Soldiers, his family, and friends.

4. A review of the applicant's service records show:

a. He enlisted in the Regular Army on 3 April 1997. He held military occupational specialty 13B (Cannon Crewmember).

b. He was assigned to A Battery, 1st Battalion, 15th Field Artillery, in Camp Hovey, Korea.

c. A CID Report of Investigation, dated 24 February 1998, shows, in part, the applicant was charged with aggravated assault, and assault, with a date of offense on 4 October 1997.

d. A DA Form 4833 (Commander's Report of Disciplinary or Administrative Action), dated 6 July 1998, shows, the applicant received an oral reprimand.

e. On or about 10 September 1998, the applicant was reassigned to Fort Hood, TX.

f. On or about 10 October 2002, the applicant was reassigned to Camp Hovey, Korea.

g. A CID Report of Investigation, dated 6 February 2004, shows, in part, the applicant was charged with larceny of government property, fraud and making a false statement, for the period 8 October 2002 to 24 October 2003. The Staff Judge Advocate opined sufficient admissible evidence was available.

h. General Court-Martial Order Number 13, issued by Headquarters, 2nd Infantry Division, shows a Court-Martial convened on 14 April 2004. The applicant was arraigned, tried, and convicted of the following:

(1) Charge I, Article 107, Specification: in that the applicant did, on or about 8 October 2002, with intent to deceive, sign an official statement to wit: DA Form 5960 (Authorization to Start, Stop or Change Basic Allowance for Quarters and or Variable Housing Allowance), which statement was false and was then known by the accused to be so false.

(2) Charge II, Article 121, Specification: in that the applicant did, on or about 24 October 2003, steal U.S. currency, military property, of a value of over \$500.00, the property of the U.S. Government.

i. He was sentenced to be reduced to private/E-1, to be confined for 6 months, and to be discharged from the service with a bad conduct discharge on 14 April 2004.

j. The sentence was approved, and, except for the bad conduct discharge, will be executed.

k. On 7 April 2005, the sentence to a bad conduct discharge, confinement for 6 months, and reduction to private/E-1, adjudged on 14 April 2004, as promulgated, has been finally affirmed. That sentence pertaining to confinement has been served. Article 71(c) having been complied with, the bad conduct discharge will be executed.

l. On 14 April 2004, the applicant's duty status changed from present for duty (PDY) to confined military authorities.

m. On 24 September 2004, his duty status changed from confined military authorities to PDY.

5. The applicant was discharged from active duty on 24 March 2006. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was discharged under the provisions of Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 3, as a result of court-martial, other, with a bad conduct characterization of service. His DD Form 214 also shows:

a. He completed 8 years, 6 months, and 12 days of active service.

b. He was awarded or authorized the National Defense Service Medal, Korea Defense Service Medal, Army Service Ribbon, and the Overseas Service Ribbon.

c. Item 18 (Remarks) contains the following remarks:

- Continuous Honorable Active Service 19970403-20000402
- Immediate Reenlistments This Period 20040403-20060324

- d. He received a separation code of "JJD" and a reentry code of "4."
 - e. Lost time during this period 20040414-20040923.
6. The CID provided copies of the applicant's CID Report of Investigation, dated 24 February 1998 and 6 February 2004; and his DA Form 4833, dated 6 July 1998 and 27 April 2004.
7. The applicant was provided a copy of the CID Report of Investigation to allow him an opportunity to respond and/or submit a rebuttal. The applicant submitted a statement.
- a. The incident on 21 October 1997 for aggravated assault and assault was at the beginning of his military career. He was young and immature. The incident took place at a shuttle stop and the individuals were being disrespectful and rude. He voiced his opinion in the matter and upon entering the shuttle one of the individuals tried to trip him, further escalating the matter.
 - b. The incident for the period 8 October 2002 to 24 October 2003 for larceny of government property, fraud and making a false statement occurred in his mid-twenties. His ex-wife and her friend urged him to file for BAH in a different area. The friend reassured him that this was acceptable. A disagreement occurred between him and his ex-wife when she asked him to add her two children to his Defense Enrollment Eligibility Reporting System (DEERS). He declined adding her children to DEERS, because both of their fathers were present and in the military. His ex-wife verbally abused him and he expressed his desire to end the marriage.
 - c. A week later he was called to the CID office. The detective accused him of giving false information. He sought guidance from a lawyer, he felt pressured to admit guilt despite his limited understanding of the BAH process. His ex-wife escalated the issue by involving his chain of command which caused considerable distress. As the situation escalated his legal counsel notified him that the trial was expedited. He was instructed to draft a letter of admission and an apology.
8. By regulation (AR 635-200), a Soldier will be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review must be completed and the affirmed sentence ordered duly executed.
9. In reaching its determination, the Board can consider the applicant's petition and his service record in accordance with the published equity, injustice, or clemency determination guidance.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition and available military records, the Board noted the numerous commendable character letters of support attesting to his integrity, community involvement and his honorable conduct as a leader, father and mentor to his family and those in need. The applicant accepts responsibility for his actions and was remorseful with his application, demonstrating he understands his actions were not that of all Soldiers. However, after reviewing the applicant's periods of honorable service and decorations and awards, the Board agreed as a SGT/E-5, the applicant should have known right from wrong.

2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct of BAH fraud to weigh a clemency determination. The ABCMR is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. The Board found the applicant has not demonstrated by a preponderance of evidence an error or injustice warranting the requested relief, specifically an upgrade of his bad conduct discharge. Therefore, the Board denied relief.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

3/4/2024

X

CHAIRPERSON

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Army Regulation (AR) 635-200 (Personnel Separations – Enlisted Personnel) sets forth the basic authority for the separation of enlisted personnel.
 - a. Chapter 3 states a Soldier will be given a bad conduct discharge pursuant only to an approved sentence of a general or special court-martial. The appellate review must be completed and the affirmed sentence ordered duly executed.
 - b. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.
 - c. A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

3. Title 10, U.S. Code, section 1552, provides that the Secretary of a Military Department may correct any military record of the Secretary's Department when the Secretary considers it necessary to correct an error or remove an injustice. With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under the UCMJ, action to correct any military record of the Secretary's Department may extend only to correction of a record to reflect actions taken by reviewing authorities under the UCMJ or action on the sentence of a court-martial for purposes of clemency. Such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that Military Department.

4. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military BCM/NRs and DRBs regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

5. AR 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//